No. 82-1713

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH A. FRAME, et al.,

*Petitioners,*

*v.*

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's determination of a question of state law when:

(a) the state statute is not fairly susceptible of an interpretation that would avoid or modify the federal constitutional issues;

(b) petitioners first suggested abstention and certification of the state law question in their petition for rehearing before the Court of Appeals; and

(c) the respondent state parties invoked the jurisdiction of the District Court and oppose abstention or certification.

2. Whether the Free Exercise Clause of the first amendment or the Equal Protection Clause of the fourteenth amendment require a public school corporation to provide the same transportation services for students attending private sectarian schools that it provides for students attending its public schools.

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## RESPONDENTS' BRIEF IN OPPOSITION

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

1. U.S. Const., amend. I, and amend. 14, § 1;
2. IND. Const. art. I, §§ 2, 6, 23;
3. 42 U.S.C. § 1983 (Supp. IV 1980); and
4. IND. CODE §§ 20-9.1-2-1, 20-9.1-2-29, and 20-9.1-7-1 (1982).

The texts of the foregoing are set forth in the petitioners' Appendix ("Pet. App.") at 77a-79a, 81a-82a, except for IND. Const. art I, § 6, which provides: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

## STATEMENT OF THE CASE

To promote racial desegregation within its school system, respondent South Bend Community School Corporation instituted programs during the 1980-81 school year which included increased bus transportation of students attending its public schools. (*See* Pet. App. at 89a). On September 8, 1981, respondent members of the Board of School Trustees of the South Bend Community School Corporation voted to provide bus transportation along existing school bus routes, and on a space available basis, for students attending private parochial schools within the School Corporation's boundaries. (Pet. App. at 92a).

On September 22, 1981, petitioners, children attending private Catholic parochial elementary and high schools and their parents, commenced this action in the Superior Court for St. Joseph County, Indiana. (Pet. App. at 94a). Petitioners' complaint alleged that respondents were "providing bus transportation to public school children" and were "refusing to provide the same safe transportation" for the plaintiff children attending private parochial schools. (Pet. App. at 98a). Petitioners alleged that this failure to provide the same transportation violated their rights under state statute, the Free Exercise Clause of the first amendment and the Equal Protection Clause of the fourteenth amendment of the United States Constitution, and counterpart provisions of the Indiana Constitution. (Pet. App. at 99a-100a).

Petitioners brought their action as a class action on behalf of themselves and "all other taxpaying parents who have

chosen to send their children to private Catholic parochial schools within the geographical jurisdiction of the School Corporation." (Pet. App. at 96a). Pursuant to 42 U.S.C. § 1983, petitioners sought damages on behalf of themselves and the class, attorney's fees, and declaratory and injunctive relief ordering respondents to "provide . . . parochial Catholic school children with school bus transportation to their chosen schools, using the same guides and eligibility requirements encompassed within the plan developed to transport children who attend public schools." (Pet. App. at 101a-103a).

Respondents removed this action pursuant to 28 U.S.C. § 1441 to the United States District Court for the Northern District of Indiana. Following a hearing on petitioners' motions for a preliminary injunction and class certification and respondents' motion to dismiss the complaint for failure to state a claim, the District Court certified petitioners' claims for damages as a class action pursuant to Fed. R. Civ. P. 23(b)(3), and their claims for injunctive relief as a class action pursuant to 23(b)(2). District Judge Sharp thereafter recused himself from the case, and the parties consented to the referral of the case to the United States Magistrate pursuant to 28 U.S.C. § 636.

By an unreported memorandum opinion and order entered January 18, 1982, the District Court granted respondents' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Pet. App. at 15a-62a). The Court determined that the applicable Indiana statute did not require respondents to provide school transportation for parochial school children on equal terms with public school children (Pet. App. at 25a-49a), but only that they "supply transportation when eligible parochial school children can be accommodated on public school buses already in operation for the benefit of public school children." (Pet. App. at 48a-49a). The District Court further held that the failure to provide transportation for parochial school students on equal terms with public school students did

not violate petitioners' rights freely to exercise their religion and to equal protection of the laws under the first and fourteenth amendments of the United states Constitution and the counterpart provisions of the Indiana Constitution. (Pet. App. at 49a-60a).

Following entry of the District Court's memorandum opinion and order dismissing the complaint, petitioners moved for a new trial and to amend the judgment, which the Court treated as a motion to amend the judgment of dismissal pursuant to Fed. R. Civ. P. 59(e). (Pet. App. at 64a-65a). Insofar as petitioners' motion sought to assert new claims alleging that respondents were failing to provide transportation to the limited extent required by state statute, the District Court declined to assert pendent jurisdiction over those state law claims (Pet. App. at 66a-69a), and reaffirmed its dismissal of the action. (Pet. App. at 70a-71a).

On petitioners' appeal of the dismissal of their action, the Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. In an unpublished order dated November 30, 1982 (Pet. App. at 2a), the Court of Appeals affirmed the District Court's determinations that state law provides for only limited transportation of parochial school students, and that the failure to provide the same transportation for parochial school students as is provided for public school students does not violate petitioners' rights under the state and federal constitutions. (Pet. App. at 5a-8a). The Court of Appeals also held that the District Court did not abuse its discretion in declining to exercise pendent jurisdiction over petitioners' new claims that respondents were not providing the limited transportation required by state law. (Pet. App. at 8a-9a). However, the Court of Appeals reversed the District Court's dismissal of those claims, holding that since the case had been removed to federal court, those state law claims should have been remanded rather than dismissed. (Pet. App. at 9a-12a).

Petitioners thereafter petitioned the Court of Appeals for rehearing, and suggested for the first time that the Court of Appeals certify all state law questions to the Indiana Supreme Court. By order dated January 27, 1983, the Court of Appeals denied the rehearing petition. (Pet. App. at 74a-75a).

## SUMMARY OF ARGUMENT

The Court of Appeals correctly affirmed the District Court's decision rejecting petitioners' state law claims to equal transportation services, and acted properly and within its discretion in denying petitioners' suggestion on petition for rehearing that the state law claims be certified to the Indiana Supreme Court. The decision of the Court of Appeals on petitioners' federal claims is correct, is in accordance with this Court's decisions, does not conflict with the decisions of any other federal court, and does not warrant further review.

## ARGUMENT

### I. The Court of Appeals Properly Affirmed The District Court's Determination That Petitioners Have No State Law Right To The Same Transportation As Is Provided To Students Attending Public Schools.

Petitioners urge that the Court of Appeals' affirmance of the dismissal of their state law claims to equal transportation services "call[s] for an exercise of this Court's power of supervision." (Pet. at 22). However, it is petitioners' argument that this Court should certify those state law questions to the Indiana Supreme Court, or order on its own motion that the District Court abstain under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (Pet. at 25-26 & n. 14), that calls for a "depart[ure] from the accepted and usual course of judicial proceedings." (Pet. at 22). The Court of Appeals' affirmance of the dismissal of petitioners' state law claims to equal services is not even arguably erroneous, let alone so demonstrably outrageous as to warrant exercise of this Court's supervisory power.

Petitioners did not move for *Pullman* abstention in the District Court. Furthermore, petitioners did not argue *Pullman* abstention in the Court of Appeals or move for certification of the state law issues before that Court's decision. Only after losing their appeal on the merits did petitioners first suggest — in their petition for rehearing — certification to the Indiana Supreme Court.

Petitioners' abstention-*cum*-certification argument to this Court thus presents a classic instance of the defeated litigants' attempt at a second bite at the apple. Having thoroughly briefed the state law issues to the Court of Appeals and having urged that Court to hold in their favor, petitioners upon losing now urge that another court should have decided those issues. This Court has repeatedly noted that the abstention doctrine is

equitable in origin and that a party's failure to suggest it at the early stages of the litigation properly influences any later decision whether it should be ordered. *E.g., Bellotti v. Baird,* 428 U.S. 132, 143 n.10 (1976); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 328-29 (1964); *see also First Federal Sav. & Loan Ass'n v. Greenwald,* 591 F.2d 417, 424-25 (1st Cir. 1979). The Court of Appeals plainly did not abuse its discretion in denying petitioners' belated suggestion for certification in their petition for rehearing.[1]

Furthermore, *Pullman* abstention would have been improper even had it been suggested to the District Court or the Court of Appeals in a timely manner because neither of the policies informing that doctrine are present in this case. Where, as here, the state agency and officials themselves invoked federal jurisdiction and oppose abstention, the policy of avoiding "needless friction" with state policies and administration, *Railroad Comm'n v. Pullman Co.,* 312 U.S. at 500-01, carries little if any weight. *Cf. Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84, 93 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977).

As importantly, *Pullman* abstention is improper unless the state statute involved is "fairly susceptible" of an interpretation

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[1] This Court has said resort to the certification technique in particular "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974). *See also id.* at 395 (Rehnquist, J., concurring):

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. The question of whether certification on the facts of this case, particularly in view of the lateness of its suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice.

"that would avoid the necessity of constitutional adjudication." *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973). *Accord New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100 n.3 (1978); *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n.5 (1978); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 597-98 & n.29 (1976); *Procunier v. Martinez*, 416 U.S. 396, 402-404 (1974) (no "reasonable interpretation" of the state statute "would avoid or modify the federal constitutional question"). There is no such "fair" or "reasonable" interpretation available in this case that could avoid the federal constitutional issues.

IND. CODE § 20-9.1-7-1 (1982) provides:

> When school children who are attending a parochial school in any school corporation reside on or along the highway constituting the regular route of a public school bus, the governing body of the school corporation shall provide transportation for them on the school bus. This transportation shall be from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to and from the parochial school or to and from the point on the regular route which is nearest or most easily accessible to the parochial school.

There is no "fair" or "reasonable" interpretation of that language that could confer upon petitioners a statutory right to the same transportation as is provided to students attending public schools.

As set forth in the District Court's opinion, 50 years of state interpretation and legislative action, as well as the express terms of IND. CODE § 20-9.1-7-1, repudiates petitioners' statutory claim. That Indiana statute was originally enacted in 1933 as an amendment to Burns' Ind. Stat. § 28-2805. (*See* Pet. App. at 32a-34a). In 1936, an official opinion of the Indiana Attorney General concluded the amendment "neither requires nor authorizes the school . . . trustees to place any additional bus on the route in order to accommodate parochial pupils otherwise eligible for transportation." 1936 Op. Ind. Att'y Gen. 415, 416.

Thus, "the privilege of free transportation to parochial pupils [extended only] where they could be accommodated in the bus or conveyance already in use on such regular route . . . ." *Id.*

In 1963, the Indiana legislature created a Commission to study and recommend to the legislature a codification of the State's school transportation laws. 1963 Ind. Acts, ch. 414. At the request of the chairman of the Commission, the Indiana Attorney General reaffirmed his 1936 opinion interpreting the statute. 1964 Op. Ind. Att'y Gen. 44, 46. The Commission then recommended enactment of a statutory provision nearly identical in language to the original statute, *Report of Commission To Recodify School Transportation Laws, reprinted in* Indiana Legislative Advisory Commission, *Report To The General Assembly of 1965* at 177, 193 (1965), and reported to the legislature that "[t]he situation *vis a vis* the availability of public school buses to parochial school students *will remain exactly the same* as it is under today's laws." *Id.* at 179 (emphasis added). Pursuant to the Commission's Report, the legislature enacted the Commission's recommendation verbatim as Burns' Ind. Stat. § 28-5002. *See* 1965 Ind. Acts, ch. 260, § 901.[2]

In 1973, the Indiana legislature again recodified the school transportation laws, and enacted the former statute as IND. CODE § 20-9.1-7-1, again in nearly identical language. The legislature also expressly provided that no substantive change was intended in statutes re-enacted in the 1973 recodification. 1973 Ind. Acts, P.L. 218, § 6(a) (reprinted in the Compiler's Notes to IND. CODE § 20-9.1-1-1 (1982)). More recently, another opinion of the Indiana Attorney General again confirmed his longstanding interpretation of the statute. 1980 Op. Ind. Att'y. Gen. 96, 97.

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[2] Given that legislative re-enactment, based on the Commission's Report and the Attorney General's construction of the original statute, petitioners' argument that no state court has construed the statute (Pet. at 11 n.6) is simply irrelevant.

Accordingly, there would be no basis whatever for ordering *Pullman* abstention on petitioners' state law claim to equal transportation services, even had petitioners suggested abstention in the courts below and even were it not the state parties who invoked federal jurisdiction and who oppose abstention. Given the statute's express terms and clear legislative history, no "fair" or "reasonable" interpretation is available that might avoid or modify adjudication of petitioners' federal constitutional claims. Rather, the state statute "on its face gives the [respondents] the power to do what [they] did." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971).[3]

## II. The Court of Appeals Decided The Federal Issues Correctly And In Accordance With This Court's Decisions.

Petitioners' federal constitutional claim is that a public school corporation's failure to provide students attending private sectarian schools with the same transportation services

[3] In the courts below, petitioners sought to manufacture a statutory right to equal transportation by referring to IND. CODE § 20-9.1-2-1 (1982), which provides that a school corporation "may provide transportation for school children" and then arguing that § 20-9.1-1-4 defines "school children" as including "children enrolled in . . . private schools . . . ." That argument first confronts the nearly insuperable difficulties that § 20-9.1-2-1 merely authorizes and does not require that transportation be provided, and that the chapter in which § 20-9.1-2-1's authorization of transportation appears is expressly made inapplicable to "any private school." IND. CODE § 20-9.1-2-29 (1982). And even if those hurdles could be overcome, there is, as the District Court held (Pet. App. at 27a), absolutely no warrant for any interpretation which would negate the express terms and plain history of § 20-9.1-7-1 relating to transportation of students attending parochial schools.

Although petitioners assert that this Court should certify or order abstention on all state law claims, the argument portion of their petition refers exclusively to their statutory claims to equal transportation services. (Pet. at 22-26). In any event, there is, as the District Court held, no basis whatever for inferring that their constitutional claims would or should be resolved differently under the Indiana Constitution. (Pet. App. at 58a-60a).

provided students attending the corporation's public schools violates the Free Exercise Clause of the first amendment or the Equal Protection Clause of the fourteenth amendment. Simply put, petitioners argue that public aid to private parochial schools that is not *prohibited* by the Establishment Clause is *required* by the Free Exercise and Equal Protection Clauses. This Court's decisions, sound constitutional policy and common sense all dictate that the Court of Appeal's rejection of this claim was correct and does not warrant further review.

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court held that state reimbursement to parents for transportation expenses of children attending private, including sectarian, schools did not violate the Establishment Clause of the first amendment. In that decision, the Court unequivocally stated: "[*W*]*e do not mean to intimate that a state could not provide transportation only to children attending public schools* . . . ." *Id.* at 16 (emphasis added). In the years following *Everson*, that statement has been uniformly followed by all federal courts, including this one.

In *Brusca v. Missouri ex rel. State Board of Education*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), children attending private sectarian schools and their parents challenged as unconstitutional a section of the Missouri Constitution which provided:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help support or sustain any private or public school . . . or other institution of learning controlled by any religious creed, church or sectarian denomination whatever.

*Id.* at 276. In that case, as in this one, "parent-plaintiffs claim[ed] to be entitled, as a matter of federal constitutional

right, to tax-raised funds for the purpose of affording a religious education to their children." *Id.* at 276-77.

With respect to the plaintiffs' Free Exercise claim, the district court held "that to the extent the Religion Clauses of the First Amendment do not prohibit such financial aid, they do not require that it be given by the State". *Id.* at 279.[4] With respect to the plaintiffs' Equal Protection claim, the court held that there is

> nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction. So long as no invidious discrimination exists, the courts may not interfere . . . . Here, there is no discrimination in the legal sense. All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. The fact that a child or his parent for him voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school systems does not deprive him of anything by State action. Nor does a tax-paying parent who chooses to send his children to a religiously-oriented school have a constitutional right to any credit for his taxes which support the public schools simply because he will not or cannot make use of them. Other taxpayers—*e.g.*, bachelors, childless couples, corporations—pay taxes for the support of schools and receive no more benefit from such tax payments than do the parent-plaintiffs who forego sending their children to free public schools.

*Id.* (citation omitted).

On appeal to this Court, the plaintiffs in *Brusca* specifically raised both the Free Exercise Clause and Equal Protection Clause issues. Jurisdictional Statement, No. 71-940, at 2-3. This Court summarily affirmed the district court's judgment. 405 U.S. 1050 (1972).

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[4] The district court specifically mentioned school bus transportation as aid the State was not required to provide. *Id.* at 277 n.2.

Subsequently, in *Luetkemeyer v. Kaufman*, 364 F.Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), children attending a parochial school and their parents challenged under the Free Exercise and Equal Protection Clauses the State's refusal to provide bus transportation. In that case, unlike this one, transportation was denied parochial school students even on existing buses and routes maintained by the public schools. *Id.* at 379.[5] The district court rejected both constitutional claims. *Id.* at 381-384. Plaintiffs expressly argued that because *Everson* held that public transportation for parochial school students did not violate the Establishment Clause, such transportation was required by the Free Exercise Clause. *Id.* at 381. The district court held, however, that "[p]rinciples which state what a State *may* do may not properly be read as a command to what a State *must* do." *Id.* (emphasis in original).

On appeal to this Court, the plaintiffs in *Luetkemeyer* raised both the Equal Protection and Free Exercise issues. Jurisdictional Statement, No. 73-1612, at 8-9. This Court summarily affirmed the district court's judgment. 419 U.S. 888 (1974).[6]

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[5] Justice White, joined by the Chief Justice, may have had that fact in mind in dissenting from the Court's affirmance—he "question[ed] whether *in some circumstances* a State may be constitutionally compelled to provide such transportation." 419 U.S. at 889 (White, J., dissenting) (emphasis added). *Cf. Widmar v. Vincent*, 454 U.S. 263, 288 (1981) (White, J., dissenting):

> There are a variety of state policies which incidentally benefit religion that this Court has upheld without implying that they were constitutionally required of the State. *See . . . Everson v. Board of Education*, 330 U.S. 1 (1947) (state provision of transportation to parochial school students).

[6] *See also DiCenso v. Robinson*, 316 F. Supp. 112, 123 (D.R.I. 1970), *aff'd sub nom. Lemon v. Kurtzman*, 403 U.S. 602 (1971) (rejecting intervenors' argument that the "Free Exercise Clause demands affirmative state action" for private sectarian schools); *Valencia v. Blue Hen Conference*, 476 F. Supp. 809, 823-24 (D. Del. 1979), *aff'd*, 615 F.2d 1355 (3d Cir. 1980); *Thomas v. Allegany*

*Footnote continued on next page.*

The issues presented in this case are controlled by those decisions. As in *Brusca*, 332 F.Supp. at 279, all children under respondents' jurisdiction have the right to attend the public schools, and the distinction drawn by respondents in terms of transportation services is between those who do and those who have chosen not to. This case does *not* involve any invidious discrimination based upon religious belief. *There is no allegation in the complaint that respondents are discriminating among particular sectarian schools, or between sectarian and other private schools.* There is no such allegation because petitioners know that they are being afforded the same limited transportation services that respondents make available to students attending all private schools within the School Corporation's boundaries.[7]

Even were the facts otherwise, this Court has recognized that a State has "leeway" in denying public support to private parochial schools in the interest of maintaining a higher wall between church and state than is compelled by the Establishment Clause of the first amendment. *Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973). In *Norwood*, this Court invalidated a state statute providing textbooks to private schools

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*Footnote continued from previous page.*

*County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982); *Cook v. Griffin*, 41 App. Div.2d 23, 364 N.Y.S.2d 632 (1975); *Epeldi v. Engelking*, 91 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972). The only decision to the contrary, *State ex rel. Hughes v. Board of Education*, 154 W.Va. 107, 174 S.E.2d 711 (1970), *cert. denied*, 403 U.S. 944 (1971), was overruled in *Janasiewicz v. Board of Education*, 299 S.E.2d 34 (W.Va. 1982).

[7] For that reason alone, *Widmar v. Vincent*, 454 U.S. 263 (1981) is wholly irrelevant to the issues in this case. *Widmar* involved a university's denial to a religious student group of facilities made available for all other student activities. The Court determined that the discrimination constituted an invalid "content-based discrimination against . . . religious speech", *id.* at 276, and did not decide the case under the Free Exercise Clause. *Id.* at 273 n.13.

practicing racial discrimination. It rejected the argument that the right to send children to private schools, recognized in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), was "at stake," saying:

> "In *Pierce,* the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise."

*Id.* at 462.

*Norwood* also rejected a similar argument based on the alleged analogous right of state support for sectarian schools.

> Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. *Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.* . . . In the same way, a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination.

*Id.* at 462-63 (emphasis added, citation omitted).

Thus, even if state aid were given to private schools generally, such aid could be withheld from sectarian schools in furtherance of the State's policy of church-state neutrality, just as the State could withhold tax-deductible status from private schools practicing racial discrimination in furtherance of the equal protection policies of the fourteenth amendment. *Bob Jones University v. United States,* 51 U.S.L.W. 4593 (U.S., May 24, 1983). In this case, IND. CODE § 20-9.1-7-1's provision of

transportation for parochial school students on an "existing route—space available" basis is narrowly tailored to conform with the admonition of IND. Const. art. I, § 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."[8]

Conversely, petitioners' claim of constitutional right to equal transportation services plainly could not be limited to sectarian schools of petitioners' particular religious persuasion because discrimination among religious beliefs is constitutionally impermissible. *Niemotko v. Maryland,* 340 U.S. 268, 272-73 (1951). Nor could such constitutionally required public support be limited to students attending sectarian schools, *see Everson,* 330 U.S. at 4-5 & n.2; *id.* at 20, 25-26 (Jackson, J., dissenting); *id.* at 61-62 (Rutledge, J. dissenting), because discrimination in favor of religion or sectarian schools is equally impermissible. *Meek v. Pittenger,* 421 U.S. 349, 362 n.12 (1975); *Torcaso v. Watkins,* 367 U.S. 488, 495 (1961); *Public Funds for Public Schools v. Marburger,* 358 F. Supp. 29, 37 (D.N.J. 1973), *aff'd,* 417 U.S. 961 (1974).[9] Thus, successful prosecution of petitioners' claim would divert away from public

[8] Similarly, numerous state courts have rejected the teaching of *Everson,* and have held public transportation of parochial school students invalid under comparable provisions of their state constitutions. *Epeldi v. Engelking,* 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied,* 406 U.S. 957 (1972); *Spears v. Honda,* 51 Hawaii 1, 449 P.2d 130 (1968); *Opinion Of The Justices,* 59 Del. 196, 216 A.2d 668 (1966); *Board of Education v. Antone,* 384 P.2d 911 (Okla. 1963); *State ex rel. Reynolds v. Nusbaum,* 17 Wis.2d 148, 115 N.W.2d 761 (1962); *Mathews v. Quinton,* 362 P.2d 932 (Alaska 1961); *Visser v. Nooksack Valley School District,* 33 Wash.2d 699, 207 P.2d 198 (1949); *cf. McVey v. Hawkins,* 364 Mo. 44, 258 S.W.2d 927 (1953).

[9] Furthermore, all children attending private sectarian schools obviously do not do so for religious reasons, and a less than universal rule would require an at least undesirable and probably unconstitutional case by case inquiry into the individual's religious beliefs and motivation for attending a sectarian school. *See Bob Jones University v. United States,* 51 U.S.L.W. at 4601 n.30; *Widmar v. Vincent,* 454 U.S. at 269-70 n.6, 272 n.11.

education significant portions of their increasingly scarce financial resources, for it would necessarily require every school district in the country to provide for *every* private school the same transportation services provided for children attending the public schools.

Moreover, no limiting principle is available to confine petitioners' constitutional theory to the transportation services at issue in the case at bar. Squarely on the authority of *Everson*, for example, this Court held that public provision of textbooks for private sectarian schools does not violate the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 241-42 (1968). Adoption of petitioners' theory that the Free Exercise Clause compels what the Establishment Clause does not forbid would thus necessarily extend to textbooks and all other forms of public support that a State constitutionally may provide. It would therefore repeatedly inject state and federal courts into divisive religious disputes, such as those over the content of textbooks that the dissenters in *Allen* found so troublesome. 392 U.S. at 252-53 (Black, J., dissenting); *id.* at 254-65 (Douglas, J., dissenting); *id.* at 269-71 (Fortas, J., dissenting).[10] *See also,* Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680, 1685-86 (1969).

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[10] The role of the local public school board is to decide whether to veto the selection made by the parochial school. This is done by determining first whether the text has been or should be "approved" for use in public schools and second whether the text is "secular", "non-religious," or "non-sectarian." The local boards apparently have broad discretion in exercising this veto power.

Thus the statutory system provides that the parochial school will ask for the books it wants. Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed?

If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the

*Footnote continued on next page.*

Petitioners' constitutional theory would at the same time undermine substantially that "local autonomy . . . long . . . thought essential both to the maintenance of community concern and support for public schools and to quality of the education process." *Milliken v. Bradley,* 418 U.S. 717, 741-42 (1974). Every decision by state and local officials with respect to "experimentation [and] innovation" in public education so as to "tailor local programs to local needs," *San Antonio Indep. School District v. Rodriquez,* 411 U.S. 1, 50 (1973), would have to be evaluated with a view to the possibility that a court would subsequently require the same or similar programs to be provided to all private schools out of public funds. And because that constitutional theory would narrow to a razor's edge "the channel between the Scylla and Charybdis [of the Religion Clauses] through which any state or federal action must pass in order to surwive constitutional scrutiny," *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting), every Establishment Clause case would necessarily become in equal measure a Free Exercise Clause case as well. Thus, federal courts rather than state and local school officials would become the final authorities with respect to numerous "decisions with respect to the raising and disposition of public revenues [for local educational purposes]". *San Antonio School District,* 411 U.S. at 41.

The issues surrounding public taxation and support for private schools in comparison to the public schools are no less thorny and complex than those presented in *San Antonio School District,* and this Court's admonitions in that case apply with equal force to petitioners' claim here:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of

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> board resists, then the battle line between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.

392 U.S. at 255-56 (Douglas, J., dissenting) (footnotes omitted).

> educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgements made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge v. Williams,* 397 U.S. at 487. The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson v. Hackney,* 406 U.S., at 546-547. On even the most basic questions in this area the scholars and educational experts are divided. . . . Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

*Id.* at 42-43.

Our system of free secular education as developed over the last one hundred and fifty years has served this Nation and most of its citizens well. *See* Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. at 1689-91. The current difficulties of that public education system, deriving from changing demographics, waning fiscal support and numerous other causes, are equally well known. The Constitution of the United States does not require that the federal courts contribute to those difficulties, and ultimately perhaps the demise of public education, by mandating public support for those who choose,

for whatever reason, to pursue a private route. *See id.* at 1687. Petitioners' claimed constitutional entitlement to public support would have to be provided to all private schools, and would be funded in large part, if not in whole, by diversion of public funds away from public schools. Therefore, in this case far more than in *San Antonio School District,*

> there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education.
>
> The complexity of these problems is demonstrated by the lack of . . . assurance that the poor, the racial minorities, or the children in over burdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question—[the effect on] these groups . . . [is problematic at best].

411 U.S. at 56-57.

This Court has repeatedly held that a legislature's decision regarding the allocation of public funds is not constitutionally invalid merely because the result in some sense affects or indirectly burdens the exercise of a fundamental right. *E.g., Califano v. Jobst,* 434 U.S. 47 (1977) (marriage); *Dandridge v. Williams,* 397 U.S. 471, 483-87 (1970) (child bearing). And it only recently reaffirmed in the context of the Free Speech Clause of the first amendment those "scarcely novel principles" equally applicable to the instant case:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Valeo,* 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying

> strict scrutiny. *Id.*, at 93-108. *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.
>
> *The reasoning of these decisions is simple: "although government may not place obstacles in the path of a person's exercise of . . . freedom of speech, it need not remove those not of its own creation." Harris, supra*, at 316. Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318.

*Regan v. Taxation With Representation of Washington*, 51 U.S.L.W. 4583, 4586 (U.S., May 23, 1983) (emphasis added). Because the decision of the Court of Appeals applies those same principles to petitioners' claim under the Free Exercise Clause of the same amendment, and does so in conformance with the applicable decisions of this and all other federal courts, it does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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